(2)

Office - Supreme Court, U.S.
FILED
FEB 14 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK HERMAN AND FRANK MULLANEY,
Cross-Petitioners,

v.

NATIONAL BROADCASTING COMPANY, INC.,
Cross-Respondent.

On Cross-Petition For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

PHILIP C. STAHL*
IRVING C. FABER
REUBEN & PROCTOR
19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-3500

Attorneys for Cross-Respondent National Broadcasting Company, Inc.

* *Counsel of Record*

Pandick Midwest, Inc. Chicago • 454-7600

QUESTIONS PRESENTED

1. Where individuals filed claims of age discrimination with the appropriate administrative agency after having been rejected for new positions by their employer, does the two-year statute of limitations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §626(e)(1), require that suit for nonwillful claims be filed within two years of receipt of the notices of rejection?

2. Where individuals filed single charges of age discrimination with the appropriate administrative agency for their employer's decision not to hire them in new positions, may they in a subsequent court suit validly raise allegations of later failures to hire for *different* positions to excuse their failure to meet the applicable statute of limitations for filing suit on the decision which was the subject of the administrative charges?

PARTIES

The caption of the case in this Court contains the names of all parties. Cross-respondent National Broadcasting Company, Inc. ("NBC"), is a wholly-owned subsidiary of RCA Corporation, a publicly-held company. Excluding RCA Corporation's other wholly-owned subsidiaries, the following companies are subsidiaries of RCA Corporation, and hence affiliates of NBC: Les Relais de l'Isle de France S.A. (Villejuif); Societe Nouvelle D'Exploitation de Vehicules Industriels S.A. (SNEVI); Hertz Italiana S.p.A.; Hertz Penske Truck Leasing, Inc.; RCA Solid State Ltda.; RVC Corporation; Regard Records Limited; Edizioni Musicali Acqua Azzurra S.r.l.; RCA S.A.; RCA S.A. de C.V.; Editorial Mexicana de Musica, S.A. de C.V.; United Truck Leasing, Inc.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties	i
Statement of the Case	2
1. The Factual Context	2
2. The Decisions Below	3
Argument	5
1. Cross-Petitioners Did Not File Suit Within Two Years of Receiving Notice of Rejection for the E/J Positions	5
2. Alleged Discriminatory Actions After May 1978, Which Were Never the Subject of Administrative Charges, Cannot Extend the Statute of Limitations for Filing Suit on the Prior Acts That Were the Subject of Timely-Filed Administrative Charges	6
Conclusion	10

TABLE OF AUTHORITIES

	PAGES
CASES:	
Chardon v. *Fernandez*, 454 U.S. 6 (1981)	5
Delaware State College v. *Ricks*, 449 U.S. 250 (1980)	5, 6
Dickerson v. *Deluxe Check Printers, Inc.*, 703 F.2d 276 (8th Cir. 1983)	8
Lawson v. *Burlington Industries, Inc.*, 683 F.2d 862 (4th Cir.), *cert. denied*, 459 U.S. 944 (1982)	8
Love v. *Pullman Company*, 404 U.S. 522 (1972)	8
Thomas v. *Brown and Root, Inc.*, 745 F.2d 279 (4th Cir. 1984)	9
STATUTES:	
29 U.S.C. § 255(a)	4
29 U.S.C. §§ 621-634	1
29 U.S.C. § 626(d)	3-4, 8
29 U.S.C. § 626(e)(1)	i, 4, 5
MISCELLANEOUS:	
Sup. Ct. R. 17	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK HERMAN AND FRANK MULLANEY,
Cross-Petitioners,

v.

NATIONAL BROADCASTING COMPANY, INC.,
Cross-Respondent.

On Cross-Petition For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

Cross-respondent, National Broadcasting Company, Inc. ("NBC"), respectfully opposes the Cross-Petition for Certiorari filed by cross-petitioners Frank Herman and Frank Mullaney.

NBC has petitioned for certiorari in No. 84-984 to review the Court of Appeals' reversal of summary judgment for NBC on a charge of willful age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634. With respect to the issues presented in the Cross-Petition, however, which relate to the running of the two-year statute of limitations for nonwillful claims of age discrimination, the decision of the Court of Appeals upholding partial summary judgment for NBC is correct, and merely applied settled law to the facts of this case. Moreover, cross-petitioners have presented no sound reasons justifying discretionary review by this Court. Rule 17. Accordingly, the Cross-Petition should be denied.

STATEMENT OF THE CASE

1. The Factual Context

Cross-petitioners Herman and Mullaney were employed as film editors in the news department of NBC's Chicago station, WMAQ-TV. As videotape replaced film in the news gathering process during the 1970's, NBC gradually phased out its film department in favor of a new electronic journalism ("E/J") department, with employees of the film department applying for new E/J positions as they were created. (Pet. App. at 2a, 12a.)

On March 14, 1978, WMAQ-TV posted a written announcement for six E/J positions — three E/J editing positions and three E/J minicam positions. (Pet. App. at 20a-21a.) Cross-petitioners, who were both experienced film editors with NBC, submitted applications for the new editing positions. (Pet. App. at 2a, 12a.) At the time of their applications, Herman and Mullaney were ages 58 and 53, respectively. (Pet. App. at 22a.)

On March 31, 1978, both cross-petitioners received a memorandum from the NBC official in charge of hiring for the new E/J positions informing them that their applications had not been accepted. The memorandum also informed them that their job applications would be kept on file pending vacancies. (Pet. App. at 12a.)[1] At about the same time, NBC also gave each cross-petitioner a formal, written notice of termination due to the change to videotape news gathering. (*Id.*) Herman's letter was received on April 28, 1978, and stated that his last day of employment at NBC would be June 30, 1978. Mullaney's letter of termination was dated March 24, 1978, and stated that his final date of employment would be May 21, 1978. (*Id.*)

---

[1] As cross-petitioners correctly point out (Cross-Pet. at 5 n.6), a typographical error in the District Court's decision dated the letter as March 31, 1979, rather than the correct date of March 31, 1978.

Cross-petitioners each filed age discrimination charges with the Department of Labor, Herman on May 8, 1978 and Mullaney on May 11, 1978. (*Id.*) Neither filed any additional charge of age discrimination with the Department of Labor or the EEOC[2] after May 1978. (Pet. App. at 3a, 13a.)

Cross-petitioners filed their two-count complaint on May 2, 1980 — more than two years after they had received their written notices of rejection and termination in March and April 1978. Count I of the complaint, containing cross-petitioners' nonwillful claims, alleges that NBC violated ADEA in the following manner:

> Plaintiffs were laid off from their jobs due to [NBC's] substitution for film and the associated film jobs by video tape and associated video tape equipment. Plaintiffs were separated from [NBC's] regular staff of employees because they were unlawfully rejected and/or not considered for other regular staff positions with the Company solely because of their ages.

Compl. at para. 7. No post-May 1978 act of discrimination against cross-petitioners is alleged in their complaint or revealed in their answers to interrogatories.

2. The Decisions Below

The United States District Court for the Northern District of Illinois (Hart, J.) granted NBC's motion for partial summary judgment on cross-petitioners' charge of nonwillful age discrimination. (Pet. App. B.) The District Court found that the applicable statute of limitations ran from March 31, 1978, the date on which cross-petitioners were informed that they were not selected for the E/J positions. (*Id.* at 14a-15a.) Although cross-petitioners had filed their administrative charges well within the 180-day filing period mandated by 29 U.S.C.

---

[2] Effective January 1, 1979, the Equal Employment Opportunity Commission ("EEOC") replaced the Department of Labor as the responsible agency for age discrimination cases. *See* Cross-Pet. at 2 n.1.

§626(d), their suit (filed May 2, 1980) failed to comply with the two-year statute of limitations for nonwillful claims of age discrimination. 29 U.S.C. §626(e)(1), incorporating section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. §255(a). Cross-petitioners' assertion that NBC's post-termination actions constituted a "continuing violation" was unavailing, explained the court, because the effect of the continuing violation doctrine is to toll the 180-day period for filing with the EEOC, not the two-year statute of limitations. "The continuing violation doctrine is meaningless under the facts of this case." (*Id.* at 16a.)

The Court of Appeals for the Seventh Circuit (Circuit Judges Pell and Eschbach and Senior District Judge Wyatt) affirmed the District Court's dismissal of the claim of nonwillful discrimination.[3] (Pet. App. A.) The court found that "no post-termination decision or act of NBC was made the basis of an administrative charge." (*Id.* at 3a.) Since the "most recent decision properly before the court . . . is NBC's decision to terminate Herman, which was made known to him in April of 1978," *id.*, the court found that cross-petitioners' court suit — filed on May 2, 1980 — was not commenced within the two-year statute of limitations applicable for nonwillful claims of age discrimination.

---

[3] The Court of Appeals' reversal of summary judgment on the claim of willful discrimination is the subject of NBC's Petition for Certiorari in No. 84-984.

ARGUMENT

1. Cross-Petitioners Did Not File Suit Within Two Years of Receiving Notice of Rejection for the E/J Positions.

It is undisputed that cross-petitioners received notices of rejection for the E/J positions on March 31, 1978. It is also undisputed that they filed their only charges with the appropriate federal agency in May, 1978, and that they delayed filing suit until May 2, 1980, more than two years after having received notice of the allegedly discriminatory action. Under Section 7(e)(1) of ADEA, 29 U.S.C. §626(e)(1), and the standards established by this Court, cross-petitioners' suit was not timely filed. *Delaware State College* v. *Ricks,* 449 U.S. 250, 258 (1980) (Title VII statute of limitations begins to run on the date the employee receives notice of the allegedly discriminatory decision, not when the consequences of that decision are felt); *Chardon* v. *Fernandez,* 454 U.S. 6, 8 (1981) (the applicable limitations period begins to run when the employee receives a letter notifying him of the challenged employment decision).

Cross-petitioners appear to base their cross-petition in part on the fact that the Court of Appeals identified Herman's dismissal notice as the most recent decision properly before the court. (Cross-Pet. at 9, 11-12.) If anything, the court was overly generous to cross-petitioners, since notice of the allegedly discriminatory act — their rejection for the E/J positions — was received on March 31, 1978. Thus, under the decisions cited above, a timely suit would have had to be commenced by March 31, 1980, as the District Court held. (Pet. App. at 15a.) But even accepting the Court of Appeals' finding (based perhaps on the complaint quoted at p. 3 *supra*) that the most recent decision properly before it was NBC's April 1978 decision to terminate Herman (Pet. App. at 3a), cross-petitioners' suit on the nonwillful claims was still untimely filed, since it was commenced more than two years later.

In short, cross-petitioners have presented no valid reasons for believing that the Seventh Circuit misapplied or misinterpreted this Court's decision in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). Consistent with *Ricks*, the Court of Appeals simply held that the statute of limitations begins to run on the date the employee receives notice of the allegedly discriminatory action — here, either NBC's decision not to hire cross-petitioners for the E/J positions (the subject of their administrative charges filed with the Department of Labor) or NBC's April 1978 letter notifying Herman of his termination. In either case, a suit filed on May 2, 1980 failed to satisfy the two-year statute of limitations for nonwillful claims of age discrimination.

2. Alleged Discriminatory Actions After May 1978, Which Were Never the Subject of Administrative Charges, Cannot Extend the Statute of Limitations for Filing Suit on the Prior Acts That Were the Subject of Timely-Filed Administrative Charges.

NBC's rejection of cross-petitioners' applications for the March 1978 E/J positions was the subject of their administrative charges filed with the Department of Labor in May 1978. Cross-petitioners never filed any other administrative charges with the Department of Labor or the EEOC, whether related to NBC's post-termination actions generally or to NBC's failure to hire cross-petitioners for any subsequent E/J positions for which they may have applied.

The simple and unavoidable fact is that cross-petitioners failed to file suit within two years of their rejection for the March 1978 E/J positions. That rejection was the basis of their administrative charges that were timely filed with the Department of Labor, and cross-petitioners have presented no equitable reasons why the statute of limitations should be extended.

Instead, cross-petitioners dispute the facts presented below[4] and suggest that NBC's post-termination (and post-charge) actions constituted a "continuing violation" of law that tolled the two-year statute of limitations for filing suit on the only NBC action on which cross-petitioners *did* file administrative charges — NBC's rejection of their applications for three E/J editing positions in March 1978. But as the District Court held, "[h]aving properly filed with the [Department of Labor] in the first instance, they cannot now ignore the reason for that filing and its applicable limitations' period." (Pet. App. at 17a.)

Cross-petitioners' eleventh-hour creation of so-called "continuing violations" — not alleged in their complaint or identified in their answers to interrogatories — turns that doctrine on its head. As the District Court explained, the continuing violation doctrine tolls only the 180-day period for filing with the administrative agency, and then only for those discriminatory acts which occurred *prior* (not subsequent) to the filing of the administrative charge. (*Id.* at 16a.) Under the facts of this case, as both courts below agreed, the continuing violation doctrine is "meaningless." (Pet. App. at 3a, 16a.)

The rejection of cross-petitioners' applications for E/J editing positions and the decision to terminate their staff employment in the Spring of 1978 constituted discrete and completed employment decisions. Any subsequent, allegedly discriminatory employment decisions — including failures to rehire at some unspecified date thereafter — constituted separate and completed acts by defendant which would trigger a new 180-day period for filing administrative charges with the

[4] Throughout the Cross-Petition (*e.g.*, pp. 7 and 10 n.10), cross-petitioners allege "facts" that are unsupported by the record. Contrary to cross-petitioners' representations, as the Court of Appeals squarely found (Pet. App. 3a), "no post-termination decision or act of NBC was made the basis of an administrative charge."

EEOC. As the Fourth Circuit recently held, "an employer's failure to recall or rehire does not constitute a continuing violation of the ADEA. Each alleged discriminatory recall constitutes a separate and completed act by the defendant, which triggers a new 180 day period." *Lawson* v. *Burlington Industries, Inc.*, 683 F.2d 862, 864 (4th Cir.), *cert. denied*, 459 U.S. 944 (1982).

None of the decisions cited by cross-petitioners is to the contrary. *Dickerson* v. *Deluxe Check Printers, Inc.*, 703 F.2d 276 (8th Cir. 1983), merely held that a written statement prepared by a Department of Labor employee and signed by the plaintiff satisfied the requirement of 29 U.S.C. §626(d) for filing a charge with the Department.[5] In the instant case, as both courts below found (Pet. App. 3a, 13a), cross-petitioners never filed any written charges with the Department of Labor or the EEOC after May 1978.

Love v. *Pullman Company*, 404 U.S. 522 (1972), featured a different statutory scheme altogether and involved the interrelationship between the EEOC and state civil rights agencies. In that case the complainant had filed a written charge of discrimination with the EEOC, which held it in "suspended animation," 404 U.S. at 526, while it communicated with the appropriate state civil rights agency. This Court held that the complainant did not have to *refile* with the EEOC after termination of the state proceedings. *Id.* Nothing in that

[5] Contrary to cross-petitioners' assertion (Cross-Pet. at 10), the Eighth Circuit did not hold that a telephone call alone satisfied the charge requirement of 29 U.S.C. §626(d). As the court clearly pointed out, 703 F.2d at 284, the *Department of Labor* informed the plaintiff that her telephone call alone had satisfied the charge requirement and never refused to take action because of the lack of adequate written charge. The court then concluded that the Department of Labor's assurances to plaintiff that she had complied with the statutory requirements might permit recovery even if her written charge was technically deficient. But as the court found, plaintiff's written statement did satisfy the statutory requirements.

decision is inconsistent with the decision in the instant case, where cross-petitioners had filed their administrative charges in timely fashion, but failed to meet the two-year statute of limitations for filing their court suit based on the same allegedly discriminatory act — NBC's March 31, 1978 decision not to hire them for the three E/J editing positions.

The last case cited by cross-petitioners, *Thomas* v. *Brown and Root, Inc.*, 745 F.2d 279 (4th Cir. 1984), also fails to support cross-petitioners' argument. In *Thomas*, the Fourth Circuit held that an administrative charge filed with the EEOC in August 1979 could not relate forward to cover plaintiff's firing in October 1979. Because the plaintiff there had failed to file a separate administrative charge concerning the October 1979 firing, the court held that there was no jurisdiction over plaintiff's subsequent suit alleging that the October 1979 firing was unlawful.

In the case now before this Court, cross-petitioners are urging that their administrative charges filed in May 1978 should also relate forward to encompass unspecified additional acts of discrimination by NBC. Their purpose clearly is to avoid the two-year statute of limitations for filing suit on the one claim of discrimination that cross-petitioners did file with the Department of Labor (relating to the March 1978 rejections). In *Thomas*, plaintiff sought to avoid the statutory requirement that an administrative charge be filed for each independent discriminatory action. The decision in *Thomas* refusing to permit a cavalier disregard of that statutory requirement cannot lend any support to cross-petitioners' argument here that the two-year statute of limitations should also be circumvented.

CONCLUSION

In brief, cross-petitioners have presented no valid reasons for this Court to review the Seventh Circuit's decision concerning cross-petitioners' claim of nonwillful age discrimination. Accordingly, the Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PHILIP C. STAHL*
IRVING C. FABER
REUBEN & PROCTOR
19 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5500

Attorneys for Cross-Respondent National Broadcasting Company, Inc.

February, 1985

* Counsel of Record